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8 JOSIE C. KO,

Plaintiff,

9 v.

10 MUTUAL PHARMACEUTICAL  
11 COMPANY, INC.,

12 Defendant.

13 Case No. C-13-00890-RMW

14 **ORDER GRANTING DEFENDANT  
15 MUTUAL PHARMACEUTICAL  
16 COMPANY, INC.'S MOTION TO  
17 DISMISS**

18 [Re: Docket Nos. 37 and 40]

19 Plaintiff Josie C. Ko brings state law products liability claims and unfair competition claims  
20 against defendant Mutual Pharmaceutical Company (“Mutual”), alleging injuries caused by  
21 defendant's product sulindac, a generic anti-inflammatory medication. Am. Compl. 2, Dkt. No. 37.  
22 Mutual moves to dismiss, asserting that Ko's claims are preempted by federal law and fail to state a  
23 claim for which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Mutual  
24 further objects to the joinder of Ko's husband, Antonio Ko, on the grounds that he was not properly  
25 added as a plaintiff to the action per Federal Rule of Procedure 15(a) and moves to dismiss his loss  
26 of consortium claim on the basis that it fails to state a claim. As explained below, the court  
27 GRANTS Mutual's motion to dismiss all claims in the action.

**I. BACKGROUND**

1        On January 17, 2013, plaintiff Josie C. Ko, proceeding pro se, filed a form complaint in the  
2 Santa Clara County Superior Court, alleging "products liability" for injuries suffered following her  
3 prescribed use of sulindac, a generic anti-inflammatory medication manufactured by defendant  
4 Mutual Pharmaceutical Company. Compl. 1, Dkt. No. 1, Ex. 1. Mutual removed the case to federal  
5 court on the basis of diversity jurisdiction. Notice of Removal ¶¶ 7–9, Dkt. No. 1. On March 6,  
6 2013, Mutual filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Mot.  
7 Dismiss, Dkt. No. 8. The court granted Mutual's motion to dismiss for failure to state a claim  
8 without prejudice on July 1, 2013, allowing Ko thirty days to amend her complaint in good faith.  
9 Order, Dkt. No. 32. Ko filed an amended complaint on July 31, 2013, alleging design defect  
10 products liability claims and state unfair competition claims arising from Mutual's alleged  
11 inadequate warning label. Am. Compl. 2–4. On the same day, Ko's husband filed a joinder  
12 declaration to add himself as a plaintiff, alleging loss of consortium based on Ko's underlying  
13 products liability claims. Joinder Dec. 1, Dkt. No. 38.

14        Mutual moves to dismiss Ko's amended complaint on the basis that Ko's claims are  
15 preempted by federal law under *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011) and *Mutual*  
16 *Pharmaceutical, Co., Inc. v. Bartlett*, 133 S. Ct. 2466 (2013). Mutual further moves to dismiss the  
17 amended complaint for failure to state a claim; and finally, objects to the joinder of Ko's husband on  
18 procedural grounds and moves to dismiss his loss of consortium claims for failure to state a claim.

**II. ANALYSIS**

20        Although pro se litigants are "held to less stringent standards than formal pleadings drafted  
21 by lawyers[]," *Castro v. U.S.*, 540 U.S. 375, 386 (2003) (quoting *Haines v. Kerner*, 404 U.S. 519,  
22 520 (1972)), here, the law is clear. Despite Ko's sympathetic situation, the court is bound by  
23 Supreme Court precedent in *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011) and *Mutual*  
24 *Pharmaceutical, Co., Inc. v. Bartlett*, 133 S. Ct. 2466 (2013). With regard to Ko's argument that  
25 current preemption law is unjust, this is beyond this court's power. The court is bound to apply the  
26 law as it is. The Supreme Court in *Bartlett* said it "would welcome Congress' 'explicit' resolution  
27 of the difficult preemption questions that arise in the prescription drug context[,"] but it was bound  
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1 to follow the current law. *Bartlett*, 133 S. Ct. at 2480. Accordingly, this court must dismiss Ko's  
2 products liability claims and state unfair competition claims.

3 **A. Preemption**

4 Mutual contends that Ko's claims, as alleged, are based on allegedly inadequate warnings on  
5 the sulindac label and fail as a matter of law because state law tort claims against generic drug  
6 manufacturers are preempted by federal law.

7 The court agrees, finding the claims are preempted. As explained in the court's prior order,  
8 "federal law preempts state law failure-to-warn claims." Order 5. Because generic drug  
9 manufacturers are required by federal law to use the same FDA approved labeling as the  
10 manufacturers of the brand-name drug, and because generic manufacturers cannot legally change  
11 their labels even to add additional warnings, any state law claims based on failure-to-warn would  
12 conflict impermissibly with federal FDA regulations, and are therefore preempted. *PLIVA, Inc. v.*  
13 *Mensing*, 131 S. Ct. 2567, 2570 (2011); *see also Mutual Pharm. Co. v. Bartlett*, 133 S. Ct. 2466  
14 (2013) (reaffirming *Mensing* and finding that state law design defect claims based on inadequate  
15 warnings are also preempted).

16 Ko's state law strict liability, negligence, and breach of express and implied warranty claims,  
17 and unfair competition claims, which rest on Mutual's alleged inadequate labeling of sulindac, are  
18 based on a failure-to-warn theory and consequently preempted by federal law. *See Gaeta v. Perrigo*  
19 *Pharm. Co.*, No. 09-15001, 2012 WL 605678 (9th Cir. 2012), *aff'g* 562 F. Supp. 2d 1091 (N.D. Cal.  
20 2008) (granting summary judgment in favor of defendant because plaintiff's state law claims for  
21 negligence, breach of express warranty, and breach of implied warranty based on inadequate  
22 warning were preempted); *see also Phelps v. Wyeth, Inc.*, 857 F. Supp. 2d 1114, 1123-24 (D. Or.  
23 Apr. 24, 2012) (holding that all warnings-based claims, including claims for negligence, strict  
24 liability, and breach of warranty are preempted); *Moretti v. PLIVA, Inc.*, No. 08-00396 2012 WL  
25 628502 (D. Nev. Feb. 27, 2012) (holding that state law claims for strict liability, negligence, breach  
26 of express and implied warranties, consumer fraud, and deceptive trade practices based on  
27 inadequate warning are preempted); *see also Caouette v. Bristol-Myers Squibb, Co.*, No. C-12-  
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1 1814 2012 WL 3283858 at \*3 (N.D. Cal. Aug. 10, 2012) (characterizing plaintiff's section 17200  
2 claims as failure to warn claims).

3 **B. Joinder**

4 With regard to the attempt by Ko's husband to join the suit as a plaintiff, because Ko's  
5 underlying claims are preempted and dismissed, the derivative loss of consortium claim is also  
6 dismissed. *See, e.g., Blaxland v. Commonwealth Dir. Of Pub. Prosecutions* 323 F.3d 1198, 1203  
7 (9th Cir. 2003).

8 **III. ORDER**

9 Mutual's motion to dismiss for failure to state a claim is GRANTED. All of the Kos' claims  
10 are dismissed with prejudice.

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12 Dated: October 18, 2013  
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RONALD M. WHYTE  
United States District Judge